SUBJECT INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED FOR REVIEW 2

CONSTITUTIONAL PROVISIONS AND GEORGIA LAWS INVOLVED 3

STATEMENT OF CASE 4

MANNER OF RAISING FEDERAL QUESTION 12

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT 12

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT 13

CONCLUSION 17

APPENDIX 18

CERTIFICATE OF SERVICE 28

TABLE OF CASES

Abrams v. State, 223 Ga. 216, hn 2 15

Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed 145 14

Amos v. United States, 255 U.S. 313 ..... 15, 16

Boyd v. U. S., 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed 746 16

Brinegar v. U.S., 338 U.S. 160, 174-177, 69 S.Ct. 1302, 1310-1312, 93 L.Ed 1879 15

Bumper v. State of North Carolina, 391 U.S. 543; 88 S.Ct. 1788; 20 L.Ed 2d 797 15

TABLE OF CASES (Con't)

Page

Carroll v. United States, 267 U.S. 132, 153, 156; 45 S.Ct. 280, 285, 286; 69 L.Ed 543 14

Chapman v. United States, 365 U.S. 610, 613-615; 81 S.Ct. 776, 778, 779; 5 L.Ed 2d 828 ..... 14, 16

Cooper v. State of California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed 2d 730 15

Gouled v. U.S., 255 U.S. 298; 41 S.Ct. 261, 65 L.Ed 647 16

Harris v. U. S., 331 U.S. 145, 67 S.Ct. 1098 16

James v. State of Louisiana, 382 U.S. 37; 86 S.Ct. 151 ..... 12, 13

Johnson v. U. S., 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed 436 16

Johnson v. Zerbst, 304 U.S. 458 (1937) 16

Jones v. United States, 357 U.S. 493, 497-499, 78 S.Ct. 1253, 1256-1257, 2 L.Ed 2d 1514 14

Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed 2d 726 13

McDonald v. United States, 335 U.S. 451, 454-456, 69 S.Ct. 191, 192-194, 93 L.Ed 153 14

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed 2d 1081 13

Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed 2d 777 13

Rios v. United States, 364 U.S. 253, 261, 80 S.Ct. 1431, 1436, 4 L.Ed 2d 1688 14

Schmerber v. State of California, 384 U.S. 853, 86 S.Ct. 1826 14

TABLE OF CASES (Con't)

Page

Silver Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed 319 16

Stoner v. State of California, 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed 2d 856 ..... 13, 14

United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed 59 14

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-300, 87 S.Ct. 1642, 1645-1647, 18 L.Ed 2d 782 ..... 12, 15

Weeks v. U. S., 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652 16

Wong Sun v. United States, 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed 2d 441 14

IN THE

Supreme Court of the United States

October Term 1968

Number_____

L. M. THOMAS, JR.,

Petitioner,

-vs-

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

L. M. Thomas, Jr. petitions this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals of Georgia entered in the case of *L. M. Thomas, Jr. v. The State of Georgia* on the 3rd day of September, 1968, in regard to the illegal and unreasonable search and seizure point ruled on by the Court of Appeals of Georgia in the headnote and Section 2 of the body of the decision.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals

of Georgia are as yet unreported but are appended hereto, (Appendix) and unofficially reported in 118 Ga. App. 359, (Advance Sheet of November 7, 1968); 163 S.E.2d 850, (Advance Sheet of November 28, 1968).

JURISDICTION

The judgment of the Court of Appeals of Georgia was dated and entered on September 3, 1968. A rehearing in said judgment was denied by the Court of Appeals of Georgia on September 18, 1968. Petition for Writ of Certiorari to the Court of Appeals of Georgia was filed in the Supreme Court of Georgia in regard to the illegal and unreasonable search and seizure point ruled on by the Court of Appeals in the headnote and section 2 of the body of the Court of Appeals decision, and was denied on November 7, 1968, Motion For Reconsideration being denied on November 21, 1968, (Appendix). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) since a right, privilege and immunity is specially claimed under the Constitution of the United States of America.

QUESTION PRESENTED FOR REVIEW

The question presented is whether State's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 (described and listed in Appendix) (R 16-17) and derivative evidence therefrom were obtained through an illegal and unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States of America made mandatory upon the states by the Fourteenth Amendment to the Constitution of the United States of America, Article I, Section I, paragraph XVI of the Constitution of the State of Georgia (1933 Code

of Ga. as amended Sec. 2-116); Vol. I Ga. L. 1966, pp. 567, 568 (Sec. 1); (1933 Code of Ga. as amended Sec. 27-301) and illegally admitted into evidence against petitioner over oral and written objection thereto made in behalf of petitioner during the trial, when petitioner was lawfully arrested for suspicion of murder at a hospital in Atlanta, Georgia where a wounded person died; then while petitioner was in custody of law enforcement officers some twenty miles from his residence, the alleged locale of the alleged homicide for which he was arrested, law enforcement officers, without a search warrant or waiver of search from petitioner, proceeded to petitioner's residence and thoroughly searched said residence, making extensive photographs therein and seizing therefrom any and all evidence which might connect petitioner with said alleged homicide, including alleged means and instrumentalities by which the homicide might have been committed.

CONSTITUTIONAL PROVISIONS AND GEORGIA LAWS INVOLVED

The Fourth Amendment to the Constitution of the United States of America provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

The Fourteenth Amendment to the Contitution of the United States of America provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The Constitution of the State of Georgia, Article I,

Section I, paragraph XVI (1933 Code of Ga. as amended Sec. 2-116) provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; . . ."

Volume I Ga. L. 1966, pp. 567, 568 (Sec. 1); (1933 Code of Ga. as amended Sec. 27-301) provides:

> "When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area *within such person's immediate presence* for the purpose of:
>
> (a) Protecting the officer from attack; or
>
> (b) Preventing the person from escaping; or
>
> (c) Discovering or seizing the fruits of the crime for which the person has been arrested; or
>
> (d) Discovering or seizing any instruments, articles, or things which are being used, or which may have been used, in the commission of the crime for which the person has been arrested: Provided, however, when the peace officer is in the process of effecting a lawful search, nothing in this section shall be construed as precluding him from discovering or seizing any stolen or embezzled property, any item, substance, object, thing or matter the possession of which is unlawful, or any item, substance, object, thing or matter other than the private papers of any person which is tangible evidence of the commission of a crime against the laws of the State of Georgia."

STATEMENT OF CASE

Petitioner, L. M. THOMAS, JR., was indicted by the Grand Jury of Fulton County, Georgia on August 4,

1967 and charged with the offense of murder, the said offense allegedly having been committed in Fulton County, Georgia on the 30th day of July, 1967. (R 4-6) On January 8, 1968, petitioner entered his plea of not guilty, and the case proceeded to trial before a jury.

The Petitioner, during the direct testimony of Atlanta Police Department Detective C. A. Bailey, put the trial court on notice that motion to suppress state's Exhibits 2, 3, 4, 5, 6, 7, and 8 would be made if it developed that said officer was not authorized to enter petitioner's home and make a search and seizure. (R 100-101) After this notice, the State, through Detective Bailey, developed evidence that when he arrived at petitioner's residence, Officer Anglin was there and the two entered the home, looking the house over to see if anyone else were there, or if anyone else had been hurt. Photographs, State's exhibits 2, 3, 4, 5, 6, 7, 8, were identified by Officer Bailey and offered as evidence in the State's behalf, it also being developed that Detective Bailey initially answered a call to Piedmont Hospital, where he found the petitioner in the custody of Detective Clements. (R 98-106) During the cross-examination of Detective Bailey, it was developed that he had heard a police radio call to Officer Anglin that a person was injured at the petitioner's residence, and the radio later made it known to Officer Anglin that the victim would be at the Piedmont Hospital. Officer Anglin, on Detective Bailey's arrival at the Piedmont Hospital, proceeded to the petitioner's residence. Lieutenant Helms, Mr. Williams of the Identification Bureau, Officer Anglin and Bailey entered petitioner's residence, they knowing that the petitioner was in the custody of Detective Clements at Piedmont Hospital, they having no waiver

of search, or search warrant, the door to the residence being open, and the four officers walking in and conducting a thorough search and seizure of any and all evidence available, extensive photographs being taken therein. (R 106-108)

At this point, oral motion to suppress all evidence which had been identified by Detective Bailey, which included State's Exhibits 1, State's Exhibits 2 through 8, 10, 11, 12, 13, and 14 on the ground that these items were secured in violation of the Fourth Amendment to the Constitution of the United States of America made mandatory on the States by the Fourteenth Amendment to the Constitution of the United States of America and also the Georgia Constitution, inasmuch as the petitioner was in custody, there was ample time and reason to secure a search warrant from proper authorities, and the petitioner did not execute any waiver to search his home, the Court being asked to suppress said evidence, the jury instructed to disregard it, and that it be stricken from the record. (R 109) The petitioner respectfully requested the Court that the case be recessed until such time as petitioner could file a written motion to suppress State's evidence in order to preserve petitioner's constitutional rights against the introduction of illegally seized items. (R 115) The Court overruled the oral motion to suppress evidence and the motion to file written objection at that time. Motion for mistrial was made in behalf of petitioner with the request that the jury be instructed, the Court overruling the motion for mistrial. (R 116) State's exhibits 2 through 8 having been identified, were tendered by the State. Objection to State's exhibits 2 through 8 was orally made in behalf of petitioner on the ground that the evidence as adduced from

Detective Bailey was in flagrant violation of petitioner's constitutional rights, and admission of State's exhibits 2 through 8 was objected to on the ground that it violated petitioner's rights under the Fourth Amendment to the Constitution of the United States of America and also the State's Constitution, said oral objection being overruled by the Court, and State's exhibits 2 through 8 admitted against petitioner. (R 116, 117)

At this point, Detective Bailey testified concerning State's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10-14, with exception of 13. (R 117-121) At this point, oral objection was made in behalf of petitioner to all the testimony Detective Bailey had given since the previous objection, on the ground that all of said testimony related to and had connection with material seized in an illegal search and seizure, the Court further being requested to exclude said testimony, instruct the jury to disregard it, and to strike it from the record. This oral motion in behalf of petitioner was overruled. Oral motion for mistrial in behalf of petitioner was made and overruled by the Court. (R 121-122)

According to the testimony of Detective E. A. Clements, Homicide Squad, Atlanta Police Department, he first went to the Piedmont Hospital where he stopped and talked with Officer Anglin, allowing petitioner and his son, L. M. Thomas, III, to sit in the police car. He viewed the deceased and observed the wounds to the body, discussing the matter with one Dr. Sommerville, petitioner relating details concerning the death of his wife, petitioner having been advised of his constitutional rights and that he was under arrest. (R 123-128)

In the testimony of Dr. Tom Dillon in behalf of the

State, he testified in connection with an autopsy performed by him, the cause of death of the deceased and concerning State's exhibits 1, 9, and 10. (R 129-133) Oral objection to testimony given by Dr. Dillon was made in behalf of petitioner in connection with State's exhibits 1 and 10 on the ground that this testimony related to evidence which was secured in an illegal search and seizure. The Court was requested to strike the testimony and tell the jury to disregard it. This oral motion was overruled. (R 133) Motion for mistrial was orally made in behalf of petitioner and said motion was overruled by the Court. (R 133-134)

According to the testimony of Detective E. A. Clements, he first went to Piedmont Hospital, Atlanta, Georgia, he approached Officer R. J. Anglin and noticed that petitioner and petitioner's son were standing near the hospital parking lot. This detective talked to Dr. Sommerville, and viewed the deceased. (R 139) After leaving the Piedmont Hospital, Detective Clements took petitioner and petitioner's son to the detective's office on the third floor of the Atlanta Police Department. (R 143) After processing paper work, Detective Clements received from Detective Bailey certain items to be taken to the crime lab in reference to the case. (R 144) Detective Clements testified concerning State's exhibits 1, 9, 10, 11, 12, 14. (R 144-146) At this point, the State tendered State's exhibits 2 through 14 with the exception of State exhibit 13. Oral objection was made in behalf of petitioner to all the testimony that Detective Clements had given relating to State's exhibits 1, 10, 11, 12, and 14 on the ground that these exhibits were the results of an illegal search and seizure in violation of petitioner's constitutional rights, both State and fed-

eral. The State pointed out that exhibits 2 through 8 had already been admitted and that the State was tendering exhibits 9 through 14 with the exception of exhibit 13. At this point, oral objection was made in behalf of petitioner to testimony of Detective Clements relating to State's exhibits 1, 11, 12, and 14 on the ground that they were the result of an illegal search and seizure, said oral motion being overruled by the Court. (R 147) Detective Clements testified that he instructed Officer Anglin to proceed to the residence of petitioner. (R 150)

According to the testimony of Officer R. J. Anglin of the Atlanta Police Department, Northside Unincorporated, at approximately 7:20 p.m. on July 30, 1967, he received a call over the police radio, signal 47, at a Mr. Thomas' residence on Old Roswell Road, and within seconds, the radio came back on the air and advised the victim was at Piedmont emergency. Detective Anglin went to Piedmont Hospital and when he arrived, Detective Clements and Detective Bailey were there. Petitioner and his son were there, and the deceased had already passed away. At that time, Officer Anglin had not gone to petitioner's residence in Roswell, Georgia. (R 154-157) For limited purposes, the Court permitted Detective Anglin to testify to what petitioner's son, L. M. Thomas, III, had stated. Detective Anglin testified that petitioner's son said that his sister in college had been notified and was on her way home, two brothers in South Georgia were on their way home, "he wished I'd go back to the house and prevent them from seeing the room his mother had been in. At that time, I talked to Detective Clements and advised him I was going back on my way to the original call, which was back at the residence of Mr. Thomas, Jr." On arrival at petitioner's

home in Roswell, Georgia, Anglin went to the front door at first, and it was ajar about six to eight inches. Detective Anglin knocked, called, and no one answered, stepped approximately a foot or two in the door since the door was open and repeated was anyone there, receiving no answer. He walked out, and went around to the side door, this door was closed, he didn't enter, just knocked, and didn't get an answer. He went back to his police car in the driveway, waited for the children who were supposed to come and also waited for the detectives and ID to come. (R 158-159) On cross-examination, Officer Anglin admitted that he did not have any type search warrant when he went to petitioner's house, nor did he have a waiver of search from petitioner. (R 159)

At this point, in behalf of petitioner, a written motion to suppress evidence was read in the presence of the Court and jury objecting to State's exhibits 1 through 12 and 14 on the grounds of an illegal and unreasonable search and seizure in violation of both federal and state constitutional rights, alleging that prior to the testimony of Detective C. A. Bailey at the trial, petitioner had no knowledge whatsoever of the alleged illegal search and seizure. The motion further moved that the testimony of Detectives E. A. Clements, C. A. Bailey, Mr. Paul Serene, and Dr. Tom Dillon relating to State's exhibits 1 through 12 and 14 be suppressed, and the said exhibits be suppressed, and the testimony and exhibits not be used in the trial or sent out with the jury. The Court ordered the Clerk to mark the written motion filed, and the Court overruled the motion. (R 254-255) The written motion was marked showing it was filed at 2:25 p.m. on January 9, 1968. (R 7-8)

Direct examination of L. M. Thomas, III, petitioner's son, resulted in denial by him that he told Officer Anglin to go to petitioner's home.

On January 10, 1968, the trial jury returned a verdict finding petitioner guilty of voluntary manslaughter under count one of the indictment, setting his sentence at eight (8) years. (R 9-10) On January 10, 1968, Honorable Oscar L. Long, Judge Emeritus, presiding in Fulton Superior Court, sentenced petitioner to eight (8) years imprisonment. (R 10) An appeal was taken to the Court of Appeals of Georgia, setting out four (4) enumerations of error, the second enumeration of error having to do with the alleged illegal and unreasonable search and seizure of and at petitioner's residence, and admission of evidence therefrom in violation of petitioner's constitutional rights. (R 162) The Court of Appeals of Georgia on September 3, 1968, affirmed the trial court, denying relief under any of the four enumeration of errors, including ground two concerning the illegal and unreasonable search and seizure. Motion for rehearing was denied by the Court of Appeals of Georgia on September 18, 1968. Petition for writ of certiorari to the Court of Appeals of Georgia was filed in the Supreme Court of Georgia in regard to the illegal and unreasonable search and seizure point ruled on by the Court of Appeals of Georgia in the Headnote and Section 2 of the body of the Court of Appeals decision, and was denied on November 7, 1968. Motion for reconsideration was denied on November 21, 1968, both motions being without opinion.

MANNER OF RAISING FEDERAL QUESTION

Petitioner, by oral motions and objections, as well as by written motion to suppress, made during the trial and as outlined in the statement of case heretofore set forth challenged the admission of testimony and evidence alleged to be the fruits of an illegal and unreasonable search and seizure at petitioner's residence without a search warrant, waiver of search, and while he was in custody some twenty miles away.

Enumeration of error 2 filed in the Court of Appeals of Georgia, in connection with the appeal to that court, complained of the admission of State's exhibits and derivative evidence introduced against petitioner which was the result of an illegal and unconstitutional search and seizure at his residence. (R 162) This same point was pressed by petitioner in his motion for rehearing in the Court of Appeals of Georgia. (R 175-179) This point was pressed in the petition for writ of certiorari to the Court of Appeals of Georgia filed in the Supreme Court of Georgia, and in the motion for reconsideration of the petition for writ of certiorari to the Court of Appeals which was filed in the Supreme Court of Georgia.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

The decision of the Court of Appeals of Georgia is contrary to the decision of this Court in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294; 87 S.Ct. 1642, and *James v. State of Louisiana,* 382 U.S. 37; 86 S.Ct. 151.

The decision of the Court of Appeals of Georgia is

contrary to the Constitution of the State of Georgia, Article I, Section I, Paragraph XVI, (1933 Code of Ga. as amended Sec. 2-116) concerning unreasonable search and seizures as well as Volume I, Ga.L. 1966, pp. 567, 568 (Sec. 1); (1933 Code of Ga. as amended Sec. 27-301) inasmuch as said code section provides that under certain circumstances not present in this case, a reasonable search of the person arrested and the area *within such person's immediate presence* may be searched.

The question involved is of gravity and importance in the administration of the criminal laws in all State and federal trials in regard to the right of a defendant against an illegal and unreasonable search and seizure in violation of his constitutional rights, and the introduction of the fruits of such searches and seizures during his trial.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. See Ga. Code Ann. Sec. 27-301; *Stoner v. State of California,* 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed 2d 856; *Preston v. United States,* 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed 2d 777. Under the doctrine of *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed 2d 1081, and *Ker v. State of California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed 2d 726, it was constitutional error to admit the fruits of an illegal search into evidence at the trial. In *James v. State of Louisiana,* 382 U.S. 37, 86 S.Ct. 151 it was held that the search of an accused's home was not an incident to his arrest on a street corner more than two blocks away,

and it was constitutional error to admit the fruits of this illegal search into evidence at the State Court trial. It is conceded that in *Schmerber v. State of California,* 384 U.S. 853, 86 S.Ct. 1826 that an exception was made concerning the approval of taking the blood sample in a drunk driving case without a search warrant on the theory that the percentage of alcohol in the blood of the accused would diminish on any delay and thus evidence might be destroyed. Searches conducted without warrants have been held unlawful not withstanding facts unquestionably showing probable cause. *Agnello v. United States,* 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed 145, for the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. *Wong Sun v. United States,* 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed 2d 441. Over and again, the Supreme Court of the United States has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes; *United States v. Jeffers,* 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed 59, and that searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, see *Jones v. United States,* 357 U.S. 493, 497-499, 78 S.Ct. 1253, 1256-1257, 2 L.Ed 2d 1514; *Rios v. United States,* 364 U.S. 253, 261, 80 S.Ct. 1431, 1436, 4 L.Ed 2d 1688; *Chapman v. United States,* 365 U.S. 610, 613-615, 81 S.Ct. 776, 778, 779, 5 L.Ed 2d 828; *Stoner v. State of California,* supra, subject only to a few specifically established and well-delineated exceptions set forth in *Carroll v. United States,* 267 U.S. 132, 153, 156, 45 S.Ct. 280, 285, 286, 69 L.Ed 543; *McDonald v. United States,* 335 U.S. 451, 454-456, 69 S.Ct. 191, 192-

194, 93 L.Ed 153; *Brinegar v. United States,* 338 U.S. 160, 174-177, 69 S.Ct. 1302, 1310-1312, 93 L.Ed 1879; *Cooper v. State of California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed 2d 730; *Warden, Md. Penitentiary v. Hayden,* 387 U.S. 294, 298-300, 87 S.Ct. 1642, 1645-1647, 18 L.Ed 2d 782, these contemporaneous searches being justified by the hot-pursuit theory of the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime, things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. These justifications and exceptions are absent where a search is remote in time or place from the arrest, for once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. It is respectfully submitted and strongly urged that there were no exigencies under the facts in this case requiring the search of petitioner's residence without a search warrant, and there is no justification for a search under the exceptions now permitted by the law. Even under the theory of *Abrams v. State,* 223 Ga. 216, hn 2, the accused was arrested, and the area within that accused's immediate presence was searched.

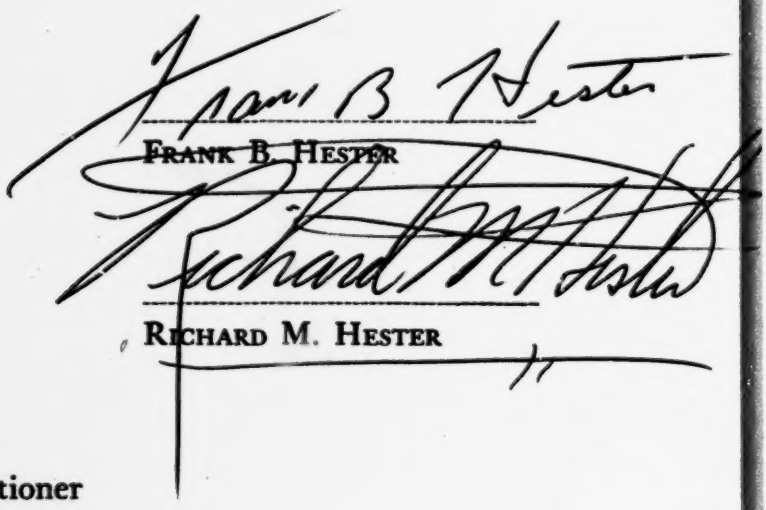
In the case of *Bumper v. State of North Carolina,* 391 U.S. 543; 88 S.Ct. 1788; 20 L.Ed 2d 797, it was held that a grandmother who was told that a search warrant existed erroneously could not consent to a search of her home that resulted in the seizure of a rifle used against defendant who lived with his grandmother. In the case of *Amos v. U. S.,* 255 U.S. 313, officers went to defendant's home, he was not at home, wife consented for them to search the house, search held unlawful. The

Amos case, supra, cites *Boyd v. U. S.,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed 746; *Weeks v. U. S.,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652; *Silver Lumber Co. v. U. S.,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed 319. See *Chapman v. U. S.,* 365 U.S. 618, 81 S.Ct. 776, 5 L.Ed 2d 828. It is respectfully submitted that petitioner's son, L. M. Thomas, III, could not waive petitioner's constitutional right against unreasonable search and seizure, and that the authority set out hereinbefore supports petitioner's contention that a verdict of guilty through use of evidence obtained in violation of the provisions of the Fourth Amendment to the Constitution of the United States renders the verdict and the judgment of conviction thereon invalid. *Gouled v. U. S.,* 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed 647; *Harris v. U. S.,* 331 U.S. 145, 67 S.Ct. 1098.) In connection with the search and seizure arguments, in *Johnson v. U. S.,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed 436, the Court said: "The officers, in making a search without a warrant would reduce the Fourth Amendment to a nullity and leave the people's property secure only in the discretion of the police officers." It should be noted that the United States Supreme Court held that, "a valuable right is never presumed to be waived." (*Johnson v. Zerbst,* 304 U.S. 458 (1937)).

CONCLUSION

It is respectfully submitted that the decision and judgment of the Court of Appeals of Georgia in not affording relief to petitioner concerning the illegal and unreasonable search and seizure and the admission into evidence against him the fruits thereof is contrary to law, and the judgment of the Court of Appeals of Georgia should be vacated, the petitioner granted a new trial, and the case remanded to that court for further proceedings in compliance therewith.

Respectfully submitted,



FRANK B. HESTER

RICHARD M. HESTER

HESTER & HESTER
Attorneys for Petitioner
803 Fulton Federal Bldg.
Atlanta, Georgia 30303

APPENDIX

In the Court of Appeals of Georgia (118 Ga. App. 359); (163 S.E.2d 850).

43816. *L. M. THOMAS, JR. vs. THE STATE*

When a person was lawfully arrested for suspicion of murder at a hospital where a wounded person died, a search without a warrant at the scene of the suspected crime, the residence of the suspect, specifically directed to the means and instrumentalities by which the crime was committed, was one which the situation reasonable demanded and was not unlawful.

The defendant appeals from his conviction for voluntary manslaughter for which he received a sentence of 8 years.

HALL, Judge. 1. The defendant enumerates as error the overruling and denying of his challenge to qualifications of panels, challenge to polls and array and his objections to excusing of jurors opposed to capital punishment. On June 3, 1968, the Supreme Court of the United States held that a death sentence cannot constitutionally be executed if imposed by a jury which by law is given broad discretion to choose between life imprisonment and capital punishment, when all persons on the panel who are opposed to capital punishment or have conscientious scruples against imposing the death penalty have been removed as disqualified for that reason alone. *Witherspoon v. Illinois,* 391 U.S. 510. (88 S.C. 1770, 20 L.Ed 2d 776) (Decided June 3, 1968.) However, on the same date the court held

in another opinion that this principle has no application in a case where the jury did not impose the death penalty. *Bumper v. North Carolina,* 391 U.S. 543. (88 S.C. 1788, 20 L.Ed 2d 797) (Decided June 3, 1968). The trial court did not err in the above rulings.

2. The defendant enumerates as error the overruling of his motion to suppress evidence made in writing after the State had rested its case. The ground of the motion was that the defendant's residence had been illegally searched by the police without a warrant, evidence seized and photographs made of the premises in violation of the defendant's constitutional rights, and that prior to the testimony of a detective the defendant had no knowledge whatever of the illegality of the search and seizure.

The Georgia Search and Seizure Law of 1966 does not expressly provide the time when the motion must be made. However, this court has held that the motion must be timely made or else it is waived. *Gilmore v. State,* 117 Ga. App. 67 (159 S.E.2d 476); *Watts v. State,* 117 Ga. App. 558 (161 S.E.2d 516). The State contends that it must always be made prior to trial. We disagree.

The Georgia law, while not identical, is similar to Rule 41 (e) of the Federal Rules of Criminal Procedure. That Rule expressly provides that the motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. "At least, the motion must be made before the testimony is begun if defendant knows of the unlawful

seizure and has had an opportunity to present the question in advance of trial." 11 Cyclopedia of Federal Procedure, 3rd ed. 591, Sec. 44.49. The Rule is merely a restatement of previous federal decisions. *Agnello v. United States,* 269 U.S. 20, 46 Sup. Ct. 4, 70 L.Ed. 145, 51, 51 A.L.R. 409. Its purpose is to avoid the interruption of the trial for the purpose of investigating the collateral issue of the legality of the means by which the evidence was obtained. 50 A.L.R. 2d 483. However, it is not "a narrow, finicky procedural requirement" in that "the court in its discretion may entertain the motion at the trial or hearing." *Jones v. United States,* 362 U.S. 257, 264, 80 Sup. Ct. 725, 4 L.Ed 2d 697, 79 A.L.R. 2d 233.

In our opinion the above principles are applicable to the Georgia statute.

Whether or not the defendant's motion was timely, however, the evidence was not subject to suppression. It appears from the record that after the deceased was wounded the defendant and his son drove her to the office of a physician and then to the hospital. When the deceased died shortly after arrival at the hospital the attending physician directed a hospital employee to call the police "Because it looked like it should be a coroner's case." The officer patroling in the area of the deceased's residence received a police radio call signaling that a person was injured at the residence. This was followed by a radio call that the victim was at Piedmont Hospital. A police detective received a radio call to go to the hospital. The patrol officer and detectives went to the hospital. One of the detectives

arrested the defendant and told him he was suspected of murder. The patrol officer then went to the residence, found the door open, went in the house and found no one there, and went back to his car ad waited for the detectives and for children of the deceased whom he stated he had been told were on their way. This officer stated that the deceased's son had requested at the hospital that he go back to the house and prevent his brothers and sisters seeing the room his mother had been in; the son denied this. Three other officers went from the hospital to the house, entered, took photographs, and took things from the house that the State used as evidence at the trial. The officer directing the investigation at the house testified that when he left the hospital the defendant was in the custody of the arresting officer, and that his authority for entering the house was that he had heard the call on the police radio to the patrol officer signaling a person was injured there, and the following call that the victim was at the hospital; that at the hospital he met the patrol officer, who left the hospital stating he was going to the residence, that he didn't know whether there was someone else injured, or who had called or whether the call had been placed from the home.

The issue is whether in these circumstances the search without a warrant at the scene of the suspected crime, the residence of the person under arrest for suspicion of murder, was reasonable. It is not questioned that the defendant was lawfully arrested. We recognize that the defendant's right of privacy is protected against unreasonable in-

vasion by the Fourth Amendment. *Warden v. Hayden,* 387 U.S. 294, 305, 307, 87 Sup. Ct. 1642, 18 L.Ed 2d 782. This is not a case like *McDonald v. United States,* 335 U.S. 451, 69 Sup. Ct. 19, 93 L.Ed 153, however, in which the officers had had the defendant "under surveillance for two months" at his house and no reason for failure to seek a search warrant appeared. Moreover, the fact of an interval of time between the arrest and the search does not render the search invalid. The relevant factor is the extent to which effective law enforcement would be frustrated by requiring the police to obtain a search warrant. The practicability of procuring a search warrant is not "a *sine qua non* to the reasonableness of a search . . . Some flexibility will be accorded law officers . . . Upon acceptance of (the) established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant . . . Whether the search was reasonable . . . depends upon the facts and circumstances — the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment." *United States v. Rabinowitz,* 330 U.S. 56, 65, 70 Sup. Ct. 430, 94 L.Ed 653; *Cooper v. California,* 386 U.S. 58, 62, 70 Sup. Ct. 430, 94 L.Ed 653. It cannot be said that in the facts and circumstances of this case the place that could reasonably be sub-

jected to search was "to be determined by the fortuitous circumstance that the arrest took place" at a different place than the search or by the fact that the place searched was the defendant's dwelling place. There is no indication that the search "went beyond that which the situation reasonably demanded," but it appears to have been "specifically directed to the means and instrumentalities by which the crimes charged had been committed." *Harris v. United States,* 331 U.S. 145, 150, 152, 153, 67 Sup. Ct. 1098, 91 L.Ed 1399. *Abrams v. State,* 223 Ga. 216 (154 S.E.2d 443).

The trial court did not err in overruling the defendant's motion to suppress.

3. There was evidence that a bent vacuum cleaner handle, which had traces of blood on it, was found in the room where the defendant and his deceased wife were shortly before her death. There was medical testimony that this instrument could have caused the deceased's fatal wound. The defendant denied hitting her with this instrument. He testified that his wife had threatened to kill him previously and on the afternoon of her death they got into a discussion and she threatened to kill him, and as she walked away from him toward a chest he threw a glass jar to excite her but did not intend to hit her; the jar did hit and cut the deceased's head.

The evidence authorized the court to charge on voluntary manslaughter. *Crawford v. State,* 12 Ga. 142 (6) (....S.E.....) *Wall v. State,* 126 Ga. 449, 551 (55 S.E. 405); *French v. State,* 42 Ga. App. 97, 98

(155 S.E. 47); *Turner v. State,* 111 Ga. App. 860 (143 S.E.2d 485); *Hamilton v. State,* 114 Ga. App. 50 (149 S.E.2d 922).

4. The defendant contends that he was entitled to a mistrial because of the Solicitor's cross-examination of the defendant's witness as to the witness' knowledge of a 1963 conviction of the defendant for a law violation. The witness had testified that the reputation of the defendant was good and he would believe him under oath. The court overruled the defendant's motion for mistrial and instructed the jury to disregard the questioning. Irrespective of the propriety or admissibility of the evidence which the Solicitor sought to present, the court did not permit him to present it and instructed the jury accordingly. The court did not err in overruling the motion for mistrial. *Spurlin v. State,* 222 Ga. 179, 181 (149 S.E.2d 315).

Judgment affirmed. Bell, P.J. and Quillian J. concur.

24935 *SUPREME COURT OF GEORGIA*

Atlanta, November 7, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

L. M. THOMAS, JR. v. THE STATE.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

24935 *SUPREME COURT OF GEORGIA*

Atlanta, November 21, 1968

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

L. M. THOMAS, JR. v. THE STATE

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied.

DOCUMENTARY EVIDENCE
FOR THE STATE

S-1 Head portion of vacuum cleaner with 2 bents, found in the Thomas' bedroom with traces of blood, located between night table and bed.

S-2 Photograph taken by Mr. Williams of I.D. Bureau depicting floor, edge of commode, bathtub, bathroom off of Thomas' bedroom, and bloody footprints and towels in cardboard box.

S-3 Photograph of Thomas' bedroom taken by Mr. Williams of I.D. Bureau depicting vacuum cleaner head between night stand and bed, bloody pillow, sheets, towels, bathrobe, gauze, lady's slip and pair of panties at the foot and on the side of the bed.

S-4 Photograph of Thomas' bedroom taken by Mr. Williams of I.D. Bureau, taken from the foot of the bed in the Thomas' bedroom showing glass all over the floor, bloody towels at entrance of bathroom, box containing bloody towels, blood by dresser, and some attempt to wipe up

blood on floor, also large piece of flesh, hair and scalp on floor.

S-5 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting closer view of dresser, bloody towels at edge of bathroom door, small pieces of glass and broken bottle, neck of broken bottle with hair and small pieces of flesh on it, also vacuum cleaner between night stand and bed.

S-6 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting closeup of broken bottle neck intact with small pieces of flesh and hair located by dresser.

S-7 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting bed, lady's slip, panties, night coat, several bloody towels, piece of gauze at foot of bed on left side.

S-8 Photograph of Thomas' bedroom, taken by Mr. Williams of I.D. Bureau, depicting large piece of hair and scalp, lady's housecoat stained with blood.

S-9 Photograph of Sarah Thomas, deceased, showing wound to left side of head as of July 30, 1967, taken by Mr. Williams of I.D. Bureau.

S-10 Broken intact neck of a quart fruit jar found in bedroom of the Thomas' home with traces of blood and hair attached.

S-11 Towels and gauze stained with human blood, type A, found in Thomas' bedroom and bathroom.

S-12 Pillow, sheets, towel and one slip, housecoat and pair of woman's panties stained with human blood, type A, found in Thomas' bedroom.

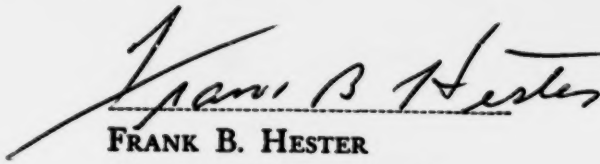
S-13 Lock of hair taken from deceased, Sarah Thomas.

S-14 Glass and hair stuck to it and also flesh found on floor of Thomas' bedroom.

CERTIFICATE OF SERVICE

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and have this day delivered three (3) copies of this Petition for Writ of Certiorari to the Court of Appeals of Georgia by personally handing same to Honorable Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia 30303.

This 4th day of February, 1969.



FRANK B. HESTER
Attorney for Petitioner,
L. M. THOMAS, JR.

HESTER & HESTER
803 Fulton Federal Bldg.
Atlanta, Georgia 30303

525-7616